

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

**IN RE NATIONAL FOOTBALL LEAGUE
PLAYERS' CONCUSSIONINJURY LITIGATION**

No. 2:12-md-02323-AB

MDL No. 2323

Kendra Moyes, *as Representative Claimant*,
Plaintiff,

v.

National Football League and
NFL Properties, Inc.,
Defendants.

**OBJECTIONS TO POST APPEAL NOTICE
OF DENIAL OF MONETARY AWARD CLAIM (12/27/2018)
ON BEHALF OF THE ESTATE OF KEN STABLER (SPID 950006982)**

TABLE OF CONTENTS

INTRODUCTION	1
ARGUMENT.....	2
I. Facts.....	2
II. The Special Master Erred as a Matter of Law.....	5
A. The Special Master Erred Because It Did Not Consider the Fundamental Claim.....	5
B. The Special Master Erred Because It Incorrectly Applied the Settlement Terms.....	6
C. The Special Master Erred Because It Considered A Different Claim Based on Different Evidence.....	9
CONCLUSION.....	10

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>In re Nat’l Football League Players Concussion Injury Litigation</i> 821 F.3d 410 (3rd 2016)	2
<i>In re Nat’l Football League Players Concussion Injury Litigation</i> 307 F.R.D. 351 (E.D. Pa. April 22, 2015)	4
<i>Max Seafood Café ex rel. Lou-Ann, Inc. V Quinteros</i> 176 F.3d 669 (3rd Cir. 1999)	5
<i>IUE Multi-Employer Pension Fund v. M&C Vending, Inc.</i> No. 2:11-cv-04335, 2013WL2007298 (D.N.J. May 13, 2013).....	6
<i>Prousi v. Cruisers Division of KCS Int’l., Inc.</i> No. 95-6652, 199 WL551359 (E.D. Pa. June 30, 1999).....	6
<i>McGovern v. Jack D’s, Inc.</i> , No. 03-5547, 2004 WL 632703, *2 (E No. 2:11-cv-04335, 2004 WL 632703 (D.N.J. May 13, 2013).....	9
STATUTES	
Fed. R. Civ. P. 53(f).	5
OTHER AUTHORITIES	
Settlement Agreement § 6.4(b)	1, 2, 6, 8, 10
Settlement Agreement § 6.6(b)	1, 2, 6, 7, 10
Settlement Agreement, Injury Definitions, §3(b)	1, 6, 7, 10
Order Appointing Special Masters.....	5

INTRODUCTION

As the NFL recently re-stated, the “bedrock principle of the Settlement Agreement is to pay all claims that meet the diagnostic impairment criteria set forth in its heavily negotiated Injury Definitions, while denying those claims that do not meet these thresholds as of the date of diagnosis.” *See NFL Obj. to Special Master’s Ruling* (D.E. 10361 at 5-6 1/02/19). In other words, this claims process is not supposed to feel like a shell-game. Although not without limits, it compensates Claimants who demonstrate neurodegenerative disease. This Objection is consistent with these aims. It occasions the Court to reject an overly mechanical application of the Settlement Agreement’s plain language, which would mute this central policy aim. By applying the Settlement terms equitably to this claim for clinically and pathologically confirmed Alzheimer’s Disease, an award of compensation is the most just and fair result.

NFL quarterback, Ken Stabler, played football for 15 years in the NFL, taking the Oakland Raiders to a Super Bowl championship, earning an MVP trophy, and, ultimately, being inducted into the Hall of Fame- all while unknowingly succumbing to a latent, degenerative dementia resulting from head impacts during his NFL play. Juxtaposed against his long-earned reputation for being intelligent and clever while on the playing field, in his last years of life, Mr. Stabler suffered from Alzheimer’s disease. At death, he also was determined to have Chronic Traumatic Encephalopathy (CTE) and Changes of Alzheimer’s disease in his brain.

Mr. Stabler’s Estate subsequently filed a Representative Claim for Alzheimer’s disease.

Ex. 1-Claim Form at 3. Mr. Stabler’s documented condition satisfied the Settlement Agreement’s Injury Definition for Alzheimer’s Disease for Players who died before the Effective Date. Medical records showed that Mr. Stabler had a Major Neurocognitive Disorder due to probable Alzheimer’s disease consistent with [DSM-V]. Sett. Agmt. Inj. Def., §3(b). *Further, Mr. Stabler “manifested actual cognitive impairment...while living,” as required by §§6.4(b) and 6.6(b) of the Settlement.*

Nevertheless, the Claims Administrator and Special Master denied this claim, “explaining” that Mr. Stabler died too late to bring a “CTE” claim, *although the Estate claimed Alzheimer’s disease, not CTE, as a Qualifying Diagnosis.* Ex. 1.¹ In denying the claim, the Special Master erred as a *matter of law* in three primary ways: (1) the Special Master incorrectly reviewed the Estate’s claim as one for “Death with CTE.” Ex. 2-Post-Appeal Notice; (2) the Special Master did not correctly apply the terms set forth in §§6.4(b) and 6.6(b) of the Settlement Agreement and applied FAQ 89 to override the Settlement’s actual terms; and finally (3) the Special Master did not consider four pieces of evidence that show Mr. Stabler had “probable Alzheimer’s disease” and “manifested actual cognitive impairment...while living.”

The purpose of the Settlement is to compensate retired Players and their families, who now live with [or lived with] “the lasting scars of an NFL career.” *In re NFL Players*

¹ This claim is not a rehash of the *Holmes* (ECF 10108) and *Bironas* (ECF 10230) CTE decisions where this Court found the CTE diagnosis deadline was a negotiated term and could not be extended.

Concussion Injury Litig., 821 F.3d 410, 444 (3rd 2016) (bracketed text added). *Of the approximate 20,000 NFL retired Players, there is not a better example of a Player who warrants compensation than Ken Stabler – 15 years in the League, suffered Alzheimer’s disease while alive, and died with Changes of Alzheimer’s disease in his brain. However, under the Special Master’s incorrect interpretation of the claim, Mr. Stabler’s family will get nothing at all.*

ARGUMENT

I. Facts

During his NFL football career, Ken Stabler sustained numerous blows to the head, causing degenerative neurocognitive disease. In 2015, Mr. Stabler suffered terminal colon cancer, which prevented him from seeking a full neurological assessment prior to his death. Ex. 3-Aff. Dr. Wall, at ¶¶3-9; Ex. 4-Clinical Notes, Dr. Wall at 9; Ex. 5-MD Anderson Recs, at 19, 22; Ex. 6-Aff. Kim Bush, at ¶¶14-15. Notwithstanding this fact, in the last years of his life, Mr. Stabler suffered documented and significant functional impairment and “manifested actual cognitive impairment[s].” Neuropsychologist Todd Solomon, Ph.D. documented that Stabler began “often repeating himself,” and, “over the next several years,” his cognition progressively worsened “in concert with forgetting recent events” and mood changes. Ex. 7-BU Rept. at 1.

Additionally, Kim Bush, Mr. Stabler’s long-term partner of 16 years, recounted her observations of Mr. Stabler’s significant memory and other cognitive impairments:

[I]n 2014 and 2015, I was noticing that Kenny was losing his memory and

some thinking abilities. I noticed he could no longer use the computer like he used to. He had successfully used the computer for years...Routine memory tasks... started to become a chronic problem...At some point in 2014, he would ask me to drive, even in familiar neighborhoods...getting around ...was becoming increasingly difficult...In 2014, I had to take charge of his daily medicines to make sure he took the correct pills at the right time. He could no longer do this on his own. Kenny had always been meticulous about personal cleanliness (dressing, showering, shaving), but I noticed this too was falling off and I helped him to maintain his personal cleanliness. He was often repeating himself in conversations...he had no idea he was doing this, and just seemed frustrated. Ex. 6 at ¶8.

At the time of his death, Mr. Stabler had documented “Changes of Alzheimer’s disease” in his brain, including “moderate diffuse plaques,” “neuritic plaques,” and “amyloid angiopathy,” as well as CTE. Ex. 7 at 2.

In 2014, the NFL’s Medical Expert, Kristine Yaffe, MD, told this Court, while testifying in support of Approval of the Settlement, that Retired Players who died with CTE, like Mr. Stabler, most likely would have received a Qualifying Diagnosis for another neurocognitive disease identified in the Settlement Agreement if those Players received neurological evaluations before they died:

Based on my review of injury definitions and test battery agreed to under the Settlement Agreement, and accepting the findings in the McKee Study as accurate, at least 89% of the former NFL players studied by Dr. Stern, Dr. McKee, and their colleagues would have been compensated under the Settlement.

Ex. 8-Yaffe Dec. at ¶83; *see also In re NFL Players’ Conc. Inj. Lit.*, 307 F.R.D. 351, 400

(E.D. Pa. April 22, 2015). This Court credited Dr. Yaffe’s testimony, noting that, while CTE is a

unique disease, “it includes symptoms compensated by Neurocognitive Impairments” and is “strongly associated with other Qualifying Diagnoses in the Settlement.” *Id.*

On September 27, 2018, Mr. Stabler’s Estate filed its claim for a Pre-Effective Date Qualifying Diagnosis of Alzheimer’s disease. While the claim included a 7-page statement and 71 pages of medical records, the Claims Administrator denied the Estate’s claim in less than one day. Ex. 9-Notice of Denial. In response, the Estate filed its Appeal of the Notice of Denial, which the Special Master denied on December 27, 2018, providing a one sentence explanation, lacking any mention of the Estate’s claim for a Qualifying Diagnosis of Alzheimer’s disease.

II. The Special Master Erred as a Matter of Law

The Stabler Estate’s claim should be allowed because the Special Master erred as a matter of law. Under Fed. R. Civ. P. 53 and the Court’s July 13, 2016 Order Appointing Special Masters, any objection to the Special Master’s conclusions of law will be reviewed *de novo*.

A. The Special Master Erred Because It Did Not Consider the Fundamental Claim

Court decisions inconsistent with “wise exercise of discretion” amount to errors of law. *Max Seafood Café. v. Quinteros*, 176 F.3d 669, 673,678 (3rd Cir. 1999). For example, if the court fails to consider a claim or defense that is so “fundamental” to the case that it bears on the court’s discretion, the court has erred as a matter of law. *See id.* In *Max’s Seafood*, the court in deciding a motion for reconsideration failed to address the defendant-restaurant’s defense that it

had not come into existence at the time of the contumacious acts in question. *See id.* In finding this error inconsistent with wise exercise of discretion, the deciding court held that the lower court erred as a matter of law and fact. *Id.* 678–79.

Here, the Special Master erred because it did not consider the Stabler Estate’s Alzheimer’s claim. The Special Master and the Claims Administrator were put on explicit notice in the Claim Form and supporting briefs and submissions that the Estate sought a Qualifying Diagnosis of Alzheimer’s, not CTE, yet, each denied the Estate’s claim by finding that Mr. Stabler’s “Asserted Qualifying Diagnosis ... [of] Death with CTE” did not qualify. However, the Estate did not seek a Qualifying Diagnosis based on Death with CTE; it sought a Qualifying Diagnosis based on Alzheimer’s Disease. Ex. 1. Here, the Special Master did not consider the *most* fundamental claim presented, the Alzheimer’s claim, and, as such, erred as a matter of law.

B. The Special Master Erred Because It Incorrectly Applied the Settlement Terms

The Special Master erred as a matter of law by not applying the Settlement Agreement terms set forth in §§6.4 and 6.6 to this claim and relying on FAQ 89 to override the terms of the Agreement. A mistake of law also is an error of law. *See IUE v. M&C Vending.*, No. 2:11-cv-04335, *2 (D.N.J. May 13, 2013). In *IUE*, the court, after reviewing relevant statutes upon a motion for reconsideration, noted that reconsideration was “necessary to correct a clear error of

law.” *Id. See also Prousi v. Cruisers*. 1999 WL551359, *1 (E.D. Pa. June 30, 1999) (“clear error of law” when court mistakenly based its decision inapposite the guiding statute).

Under the Settlement’s Injury Definitions § 3(b), a Retired Player deceased prior to the Effective Date meets the Qualified Diagnosis of Alzheimer’s Disease if there is “a diagnosis of Major Neurocognitive Disorder due to probable Alzheimer’s disease *consistent with* the definition of ... (DSM-5)” or “Alzheimer’s disease, made while the Retired NFL Football Player was living.” Sett. Agmt., § 3(b) (emphasis added). Additionally, under §6.6(b), a claimant must show that the deceased Player “manifested actual cognitive impairment and/or actual neuromuscular impairment while living.” Further, §6.6(b) continues, “For the avoidance of any doubt, the identification of a condition...that has not yet resulted in cognitive impairment...does not qualify as a Qualifying Diagnosis.” *Id.* This language clarifies that a Player must have exhibited cognitive impairment, as Mr. Stabler did.

Mr. Stabler meets the Settlement’s terms for a Qualifying Diagnosis of Alzheimer’s Disease under the first prong of the § 3(b) Alzheimer’s Disease definition because it is documented that Mr. Stabler manifested progressive cognitive impairments, including memory problems, progressively worsening over time, consistent with DSM-5. Ex. 7 at 1.

These clinical findings were consistent with the accounts of Ms. Bush, Mr. Stabler’s long-term partner, who attested to memory and cognition deficits in the years prior to Mr.

Stabler's death. Ms. Bush detailed Mr. Stabler's actual cognitive impairment and lack of independence in daily living, citing his inability to use a computer which he had done for years, inability to provide self-care, inability to manage his medications, and tendency to become lost in familiar locations. Dr. Solomon's and Ms. Bush's reports undoubtedly show that Mr. Stabler's cognitive impairments manifested during his lifetime and were *consistent with the DSM-5 criteria for Alzheimer's Disease*. Further, the clinical evidence of Alzheimer's is confirmed by pathological evidence of "Changes of Alzheimer's disease" in the brain that was inevitably present while he was alive. Ex. 7 at 2. Moreover, Dr. Yaffe, the NFL's Expert, testified that any Player diagnosed with CTE probably—in fact, *more likely than not (by 89 percent)*—had another Qualifying Diagnosis, like Alzheimer's Disease, under the Settlement. Ex. 8 at ¶83.

Section 6.4 of the Settlement Agreement states that review of whether a Qualifying Diagnosis is "based on principles generally consistent with the diagnostic criteria set forth in Exhibit 1 (Injury Definitions) does not require identical diagnostic criteria, including without limitation, the same testing protocols or documentation requirements." As such, the medical documentation, including both clinical and pathological findings consistent with Alzheimer's Disease, is sufficient to prove the Qualifying Diagnosis of Alzheimer's disease.

Additionally, "[t]he Claims Administrator has discretion" "to excuse Qualifying Diagnosis requirements, including the DPC Form and/or medical records," under conditions met

in this case. FAQ 116. The key is whether the accuracy of the diagnosis can be verified as reliable, and the absence of any particular record can be explained. In using its discretion, the Claims Administrator must consider “[t]he availability of other documents or information to verify that the claimed Qualifying Diagnosis occurred.” *Id.* Those documents in the form of clinical and pathological findings, consistent with an eyewitness account of cognitive decline, (Ex. 7; *see also* Ex. 6), and the reason why a medical record is missing (Exs. 3,4,5,6), are all present here. In sum, the medical records, sworn statement of Ms. Bush, and testimony of Dr. Yaffe, demonstrate that Mr. Stabler was most likely suffering from Alzheimer’s, and it was legal error not to consider this evidence under Section 6.4(b)’s evidentiary standards.

C. The Special Master Erred Because It Considered A Different Claim Based on Different Evidence

The Special Master erred as a matter of law when considering a CTE claim, instead of an Alzheimer’s claim, because the Alzheimer’s claim relies on different evidence than a CTE claim. Additionally, that evidence shows the criteria for a Qualifying Diagnosis of Alzheimer’s Disease consistent with DSM-5 are met. A “clear error of law” exists if the court incorrectly considers a different claim, based on different facts, than the one alleged, and that error results in an alternate decision. *See McGovern v. Jack D’s, Inc.*, No. 03-5547, 2004 WL 632703, *2 (E.D. Pa. Feb. 25, 2004) (If two claims are factually distinct and would lead to different outcomes, failure to consider that factually distinct evidence amounts to a clear error of law.).

In the present case, a clear error of law exists because the Special Master did not consider evidence of the Alzheimer's claim, including evidence that shows that Mr. Stabler "manifested actual cognitive impairment" "while living" and, ultimately, had "a Major Neurocognitive Disorder due to probable Alzheimer's Disease." *See* Sett. Agmt., §6.4(b), 6.6(b), Inj. Def. §3(b).

First, the Special Master did not consider the clinical evidence that shows Mr. Stabler "manifested actual cognitive impairment" "while living." Ex. 1 at 3; Ex. 7 at 1. Second, the Special Master did not consider the confirmatory pathological evidence that shows Mr. Stabler was determined to have "Changes of Alzheimer's disease" in the brain. Ex. 7 at 2. Third, the Special Master did not consider the confirmatory Affidavit of Kim Bush that detailed Mr. Stabler's actual cognitive impairment and functional decline. Ex. 6 at ¶8. Last, the Special Master did not consider the testimony of the NFL's Expert, Dr. Yaffe, who told this Court that Retired Players who died with CTE, like Mr. Stabler, most likely would have received a Qualifying Diagnosis for another neurocognitive disease if those Players had received full neurological evaluations before they died. Ex. 8 at ¶83. In sum, under the standards of *McGovern*, it was a clear error of law not to evaluate this evidence of Alzheimer's disease.

For the reasons stated herein, Plaintiff respectfully requests reversal of the Special Master's decision, denying the Stabler's Estate's recovery for their father's Alzheimer's disease.

Dated: January 16, 2019

Respectfully submitted,

/s/ Richard S. Lewis

Richard S. Lewis

HAUSFELD LLP

1700 K Street, NW

Suite 650

Washington, DC 20006

Phone: (202) 540-7200

Fax: (202) 540-7201

rlewis@hausfeld.com

/s/ Bradford Rothwell Sohn

Fla. Bar No. 98788

The Brad Sohn Law Firm, PLLC

2600 S. Douglas Road, Suite 1007

Coral Gables, FL 33134

Phone: (786) 708-9750

Fax: (305) 397-0650

On the Brief